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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN FOSTER,

Defendant and Appellant.

A151066

(Solano County
Super. Ct. No. FCR319708)

I. INTRODUCTION

Adrian Foster appeals from a guilty verdict of felony possession of ammunition by a felon, among other charges, and from a prison sentence that included an on-bail enhancement. He presents three arguments: that he did not forfeit his right to appeal a suppression motion by failing to renew the motion in superior court after it was denied at his preliminary hearing; that even if there was a forfeiture, he may nonetheless appeal the denial of the suppression motion because his counsel provided ineffective assistance; and that the on-bail enhancement should be stricken because the trial court failed to obtain a personal admission from him and instead relied on his counsel's statements that he intended to admit the enhancement. We find the Fourth Amendment issue was forfeited, but Foster was not denied effective assistance of counsel because the suppression motion was not meritorious. We strike the on-bail enhancement finding, vacate the accompanying sentence, and remand for the trial court to take an admission or denial of that enhancement from Foster, but otherwise affirm.

II. BACKGROUND

On January 27, 2017, a jury found Foster guilty of four of eight charged counts. The prosecution's case was a consolidated trial. Counts 1 and 2 stemmed from a February 11, 2016 incident; counts 3, 4, 5, and 6 arose out of a November 24, 2014 incident; and counts 7 and 8 grew out of an October 16, 2014 incident. Foster was convicted of count 2 (misdemeanor possession of marijuana for sale), count 3 (felony possession of ammunition by a felon), count 7 (felony possession of a concealed firearm in a vehicle) and count 8 (felony possession of a firearm by a felon). Counts 1, 4, 5, and 6 were dismissed by the prosecutor after the jury hung on those counts. Foster is only appealing issues arising out of count 3 and post-verdict proceedings, so we will not recount the facts behind the other counts.

A. Count 3 Background

On November 24, 2014, Foster was stopped and arrested by the police on a valid arrest warrant for a homicide. The police found ammunition in his vehicle after conducting an inventory search.

Prior to the arrest, Foster was being surveilled by Detective Aaron Dahl. Dahl was waiting for Foster to finish his morning class, located in a building at the Nut Tree Airport. Sometime between 10:00 a.m. and 1:00 p.m., Dahl observed Foster leave the building with another individual and walk to a silver Ford Taurus. Foster appeared to grab something from inside the car and hand it to the individual before they both returned to class, but Dahl was not able to see what, if anything, was passed between Foster and the individual.

After the class ended, Foster drove away from the Nut Tree Airport in the silver Ford Taurus. Dahl radioed Sergeant Vince Nadasdy to make the traffic stop. Nadasdy, who was not involved in the surveillance, was stationed nearby in the area of East Monte Vista Avenue. When Foster drove by, Nadasdy turned on his lights to pull Foster over. Foster pulled over in a no parking zone that was about 100 yards away from a driveway going into a Denny's and Lowe's parking lot. After arresting Foster, the police decided to impound Foster's car because it was parked in a no parking zone and was a traffic

hazard. An inventory search of the vehicle was conducted, and Dahl found ammunition inside. A CHP 180 Form was filled out detailing the other items that were found in the vehicle, including “ ‘[l]ots of trash.’ ”

On June 19, 2015, a suppression motion targeting the evidence of ammunition possession pertinent to count 3 was heard at the preliminary hearing. Foster argued that the inventory search which yielded this evidence was invalid because it was pretextual. Judge Robert S. Bowers, the same judge who presided at defendant’s jury trial, rejected the argument and denied the motion to suppress. At a pretrial hearing, defense counsel did not renew his objection to the ammunition evidence. After a jury trial, Foster was found guilty of count 3.

B. Post-Verdict Hearing Background

A post-verdict hearing was held on February 27, 2017. The People asserted that Foster was subject to an on-bail enhancement to his sentence under Penal Code section 12022.1 because he was on bail for one felony charge when he committed a second felony. On the counts of which he stood convicted, the on-bail enhancement was alleged only with respect to count 3 (felon in possession of ammunition), which was committed on November 24, 2014. The prior felonies for which Foster was on bail when he committed count 3 were those alleged in counts 7 (concealed firearm in vehicle) and 8 (felon in possession of a firearm), both of which occurred on October 16, 2014.

At the post-verdict hearing, defense counsel told the court that Foster was ready to admit he was subject to the on-bail enhancement. But during the hearing, Foster did not speak at all. Even though Foster did not personally admit the on-bail enhancement, defense counsel did not object and the court’s minute order states Foster admitted the enhancement. Foster was ultimately sentenced to five years and eight months in prison, a calculation that included two years for the on-bail enhancement. He timely appeals.

III. DISCUSSION

A. Forfeiture

Pursuant to Penal Code section 1538.5, subdivision (m), a defendant in a criminal case may move to suppress evidence taken in an unreasonable search or seizure. If the

suppression motion was decided at a preliminary hearing, to preserve the motion for review on appeal, the suppression motion needs to be raised in the superior court, “for it would be wholly inappropriate to reverse a superior court’s judgment for error it did not commit and that was never called to its attention.” (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896.)

Objections in superior court need to fairly inform the court of the alleged mistake so the court can make a fully informed ruling. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Objections need not take a particular form, however, “[a] party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.” (*Id.* at pp. 434–435.)

Here, the suppression motion was denied in a preliminary hearing. It is clear that defense counsel did not object to the suppression motion after Foster was held to answer in superior court. Because Foster failed to interpose an objection, he forfeited his right to appeal the denial of the suppression motion.

B. Ineffective Assistance of Counsel

Having concluded Foster did not preserve the right to appeal the ruling on the suppression motion, we now discuss whether failure to object to the denial of the suppression motion can be considered ineffective assistance of counsel.

Under the Sixth Amendment, criminal defendants have the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) A “claim that counsel’s assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” (*Id.* at p. 687.) The claim will generally be rejected by the appellate court if the record contains no explanation for counsel’s challenged behavior. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

To determine whether counsel’s performance was constitutionally ineffective, we must determine the legality of the search. (*People v. Hart* (1999) 74 Cal.App.4th 479, 486.) If the search was invalid, failure to preserve the issue of legality of the search

would constitute both deficient performance when measured against the standard of a reasonably competent attorney and prejudice to the defendant because there would not be sufficient evidence to convict the defendant on the charge. (*Id.* at pp. 486-487.)

Under the Fourth Amendment, of course, “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated” (See also Cal. Const., art. I, § 13.) Unreasonable searches and seizures include warrantless searches. (*People v. Wallace* (2017) 15 Cal.App.5th 82, 89.) There are exceptions, one of which occurs when police conduct an inventory search where they take “an inventory of the contents of a vehicle” while impounding it. (*People v. Williams* (1999) 20 Cal.4th 119, 126.) The high court has upheld inventory searches as constitutional because police have a legitimate interest in taking inventory of the contents of a vehicle before it is impounded to safeguard the owner’s property, and to protect the police against claims of lost, stolen, or damaged property. (*Colorado v. Bertine* (1987) 479 U.S. 367, 372–373; see also *Florida v. Wells* (1990) 495 U.S. 1, 4.) Courts do recognize the risk that the police might use an inventory search as a pretext for searching a vehicle for any contraband or other evidence. Thus, police have “discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity,” such as a community caretaking function. (*Bertine, supra*, 479 U.S. at pp. 375–376.)

Foster relies primarily on *People v. Torres* (2010) 188 Cal.App.4th 775 (*Torres*). There, the defendant was detained following a traffic stop because he did not have a valid driver’s license. (*Id.* at p. 780.) The deputy decided to impound the car and found methamphetamine and a pay/owe sheet. (*Ibid.*) At hearings on a motion to suppress evidence, the court heard testimony from the deputy saying that he decided to impound the vehicle being driven by an unlicensed driver after looking at several factors such as the driver’s driving history, how long they have been in the country, and for safety reasons. (*Id.* at p. 782.) However, on cross-examination, the deputy conceded that he never issued a citation to the defendant for driving without a license and agreed he made the impound decision to facilitate a search for narcotics after narcotics officers asked him

to find a reason to stop the defendant. (*Id.* at pp. 781–782, 789.) The appellate court found that the inventory search had an “ ‘investigatory police motive’ ” even though there were non-pretextual grounds for impounding the vehicle. (*Id.* at pp. 789–790.) The court reasoned, “[t]he prosecution failed to show the truck was illegally parked, at an enhanced risk of vandalism, impeding traffic or pedestrians, or could not be driven away by someone other than defendant.” (*Id.* at p. 790.)

Torres contrasts with *People v. Shafrir*, where the court held an inventory search constitutional because the decision to impound the vehicle was reasonable pursuant to the community caretaking function of inventory searches. (*People v. Shafrir* (2010) 183 Cal.App.4th 1238, 1247–1248 (*Shafrir*).) The defendant in *Shafrir* was pulled over and subsequently arrested for driving under the influence. (*Id.* at pp. 1240–1241.) The officers decided to impound the vehicle, a Mercedes, because it was “parked in a neighborhood in which auto theft and other crimes were common,” and found marijuana in the trunk while conducting the inventory search. (*Id.* at p. 1241.) The court held that protecting the vehicle from damage or theft was a reasonable community caretaking justification when looking at all the circumstances. (*Id.* at pp. 1247–1248.)

Arguing that this case is more like *Torres* than *Shafrir*, Foster contends that Sergeant Nadasdy’s decision to pull him over at an illegal parking location was a pretext. According to Foster, Detective Dahl’s testimony at the preliminary hearing that “we look for everything” in an inventory search indicates the arresting officers were engaged in a dragnet, seeking evidence of criminal activity. But Foster reads far too much into this testimony. Detective Dahl simply explained that during an inventory search, as a matter of practice and protocol, the arresting officers take stock of everything found in an impounded car, which of course is what the word “inventory” means in its ordinary sense. He was not suggesting that, *before* the impoundment at issue *in this case*, the arresting officers intended to carry out a dragnet.

The trial court specifically addressed Foster’s pretext argument and found, factually, that “there is no evidence that anyone”—the surveillance team led by Detective Dahl at the Nut Tree Airport, or Sergeant Nadasdy, who made the stop—“decided to wait

and pull him over in a place where they can get his car towed and inventoried.”

Substantial evidence in the record supports this finding.

Sergeant Nadasdy was not actively involved in conducting surveillance of Foster. He was in the area, though in a different location, as a “uniform presence.” He made the stop after he was notified of Foster’s departure by Detective Dahl immediately upon Foster leaving the Nut Tree Airport parking lot. As soon as Sergeant Nadasdy activated his emergency lights, Foster pulled over. On one reading of the evidence, he first passed one driveway entrance to a parking lot for Denny’s and Lowe’s; rather than turn into that driveway, which would have led to a legal place to park, Foster chose to park illegally on the side of the road. In any event, the idea that Sergeant Nadasdy directed Foster to pull over at the specific spot he did is incorrect.

As for the theory that the surveilling officers at the Nut Tree Airport, in effect lay in wait for Foster, passing up the opportunity to arrest him there, the court found they had good reasons to allow him to leave the Nut Tree Airport before ordering an arrest. “They are surveilling,” the court found, “and he is in school, and they are letting him be in school[, where] presumably he is around other people, and they are waiting presumably to where he is alone before they can come and detain him,” using the added show of force that a uniformed officer brought to the situation.

Accordingly, Foster’s ineffective assistance argument fails for lack of any showing of prejudice. Because the search of Foster’s car was a valid inventory search, it makes no difference that Foster’s trial counsel failed to renew the suppression motion. The motion was correctly denied.

C. On-bail Enhancement

Lastly, Foster argues that the on-bail enhancement should be stricken and retried because he did not personally waive his right to a jury trial on the enhancement and did not personally admit the enhancement. We agree that the court’s failure to take a personal

admission from Foster requires remand for that purpose, but we find Foster has forfeited any claim of error in connection with his failure to waive a jury trial on the enhancement.

While it appears Foster never personally waived his right to a jury trial, to the extent the Attorney General concedes Foster’s jury trial right is constitutionally based, we decline to accept the concession. The notion that Foster had a constitutional right to a jury trial derives from *Apprendi v. New Jersey* (2000) 530 U.S. 466, in which the United States Supreme Court held that any fact, “[o]ther than the fact of a prior conviction,” which increases the penalty for a crime beyond the statutory maximum, must be decided beyond a reasonable doubt by a jury. (*Id.* at p. 490.) But our state Supreme Court has “rejected a narrow or literal application of [*Apprendi*’s] reference to ‘the fact of a prior conviction’ ” (*People v. Towne* (2008) 44 Cal.4th 63, 79 (*Towne*)), adopting the rule that “a judge may make factual findings on a variety of issues that are related to a defendant’s recidivism.” (*Id.* at p. 77.)

In *Towne*, the California Supreme Court held that the aggravating circumstances of a defendant having “served a prior term in prison” (Cal. Rules of Court, rule 4.421(b)(3)) and being “on probation . . . or parole when the crime was committed” (Cal. Rules of Court, rule 4.421(b)(4)) may be determined by a judge rather than a jury. (*Towne, supra*, 44 Cal.4th at pp. 80—82.) The on-bail enhancement is similar to those aggravating factors. And the factfinding involved—that the defendant was on bail at the time of the secondary offense—as in *Towne*, may be proved by “the same type of official records used to establish the fact and nature of a prior conviction.” (*Id.* at p. 81.) Proof of on-bail status at the time of the secondary offense likely will be reflected in the court file or in readily available, admissible documents similar to those in *Towne*.

Specifically on point, a Third District panel held in *People v. Johnson* (2012) 208 Cal.App.4th 1092, 1100, that criminal defendants are not entitled to a jury trial on the truth of an on-bail enhancement because Penal Code section 12022.1 is “an enhancement statute that . . . penalizes recidivist conduct and does not relate to the commission of either the primary or secondary offense. . . .” Distinguishing *Apprendi*, while relying on *Towne*, *Johnson* held there is no constitutional right to jury trial on an on-bail

enhancement because adjudicating the enhancement does not require the court to make findings concerning the conduct underlying either the primary or secondary offense. (*Johnson*, at pp. 1099–1100.)

In *People v. Gallardo* (2017) 4 Cal.5th 120, cited by the Attorney General, the Supreme Court addressed the reach of *Apprendi* where the “ ‘nature or basis’ ” of a prior conviction was at issue (*Gallardo*, at p. 136), specifically, whether the defendant had used a deadly weapon in connection with her prior conviction under Penal Code former section 245, subdivision (a) (*id.* at p. 123). *Gallardo* therefore is distinguishable from and does not undercut the reasoning of *Johnson*. Because any right Foster had to a jury trial was statutory rather than constitutional, a personal, express waiver was not required (*People v. French* (2008) 43 Cal.4th 36, 46), and Foster’s failure to object before the jury was dismissed forfeited any appellate claim of error. (*People v. Vera* (1997) 15 Cal.4th 269, 277—278.)

The Attorney General acknowledges, as he must, that Foster does have the statutory right to either admit or deny the on-bail enhancement. “All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact.” (Pen. Code, § 1170.1, subd. (e); see also Pen. Code, §§ 1018, 1025, subd. (a); *People v. Golde* (2008) 163 Cal.App.4th 101, 113 [defendant not bound by counsel’s admission that defendant is subject to a sentence enhancement].) Here, Foster himself did not admit or deny the on-bail enhancement; instead, he sat in complete silence while his attorney spoke with Judge Bowers. We shall therefore remand the case for the trial court to take Foster’s personal admission or denial of the on-bail enhancement alleged in connection to count 3.

IV. DISPOSITION

We strike the finding and vacate the sentence on the on-bail enhancement and remand for the court to take Foster’s admission or denial and, if necessary, to conduct a bench trial on the issue. In all other respects, the judgment is affirmed.

Streeter, Acting P.J.

We concur:

Tucher, J.

Reardon, J.*

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* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.